In The

SUPREME COURT OF THE UNITED STATES

March Term, 1971

70-99

No. ~~1488~~

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, KENNETH C. KENT, ELMO HOLDER, ROBERT M. LEICH, IAN F. LOCKHART, CLIFFORD K. ARDEN, JAMES A. GEYER and PAUL E. HATFIELD, on behalf of himself and all other persons similarly situated,

Petitioners,

vs.

DELTA AIRLINES, INC., EASTERN AIRLINES, ALLEGHENY AIRLINES, INC., and WILLIAM F. WOOD, on behalf of himself and all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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In The

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Indiana entered on December 23, 1970.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Indiana, Cause No. 869 S 179, is printed in Appendix A hereto and is reported in 265 N.E. 2d 27.

JURISDICTION

The Judgment of the Supreme Court of the State of Indiana, printed in Appendix A hereto, was entered on December 23, 1970. Said Judgment was final and no petition or order respecting a rehearing was requested or required (*Southern Ry. Co. v. Clift*, 260 U.S. 316, 43 S.Ct. 126, 67 L.Ed. 283 (1923), and no request or order for an extension of time within which to petition for Certiorari was filed, granted, or required.

The jurisdiction of this Court is invoked under 28 USCA 1257(3).

THE QUESTIONS PRESENTED

1. Where an Airport, at its own expense, furnishes special facilities for the use of those engaged in commerce, interstate as well as intrastate, is it authorized to collect a reasonable use and service charge from commerce for the privilege of using and enjoying such facilities and for the purpose of defraying the costs and maintenance thereof?

2. Is a use and service charge of One Dollar ($1.00) imposed upon each enplaning commercial airline passenger by an Airport which, at great expense to its taxpayers, provides its facilities for the primary use and benefit of commercial airline passengers, an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The constitutional provision involved is the Commerce Clause, the same being Article I, Section 8, Clause 3 of the United States Constitution.

The Indiana legislative authorization for enactment of this use and service charge is found in the Acts of 1959, Chapter 15, page 32, the same being Burns' Indiana Statutes, Annotated, Section 14-1215.

The Ordinance involved in this proceeding was passed by the Petitioner, Evansville-Vanderburgh Airport Authority District, as Ordinance No. 33, on February 26, 1968.

The provisions of said Constitution, Statute and Ordinance are printed in Appendix B hereto.

STATEMENT

This was an action brought by Respondents against Petitioners for a Restraining Order, Temporary Injunction and Permanent Injunction against the enforcement of Ordinance No. 33 of the Petitioner, Evansville-Vanderburgh Airport Authority District, enacted on February 26, 1968, which Ordinance established and, effective July 1, 1968, sought to impose a use and service charge of One Dollar ($1.00) for each passenger enplaning commercial aircraft at Dress Memorial Airport, Evansville, Indiana, operated by the Petitioner Airport Authority. Respondents' Complaint was filed in four (4) pleading paragraphs, the first paragraph of which alleged that Petitioner's Ordinance No. 33 constituted an unreasonable burden on interstate commerce and was, therefore, in violation of Article I, Section 8 of the United States Constitution. (R. 16.)

Upon the filing of Respondents' Complaint on June 28, 1968, the Superior Court of Vanderburgh County, on the same date, issued a Restraining Order without Notice. (R. 76) On February 21, 1969, said Superior Court, after extensive briefing and argument of counsel, issued a Temporary Injunction (R. 312), incorporating therein special Findings of Fact and Conclusions of Law wherein the Court held that Ordinance No. 33 violated Article I, Section 8 of the United States Constitution. (R. 314-333) Petitioners filed a Motion for Change of Venue from the Judge on February 27, 1969, (R. 336), which motion was subsequently denied. (R. 350) On March 24, 1969, Petitioners filed their Answers to Respondents' Complaint wherein Petitioners denied that its Ordinance No. 33 constituted an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution, (R. 357-373), and on the same date Petitioners filed their Counterclaim praying for a recovery under its use and service charge Ordinance against the Respondent Airlines in accordance with the number of enplaning passengers which were expected to be enplaned during 1969, together with attorneys' fees and litigation costs. (R. 353-356) On April 2, 1969, Respondents filed their Demurrer to Petitioners' Counterclaim (R. 374-378), which Demurrer was sustained on April 16, 1969. On April 17, 1969, Respondents filed their Motion for Summary Judgment (R. 383-385) and on May 1, 1969, Petitioners filed their Motion for Summary Judgment. (R. 388-389) Finally, on May 8, 1969, the Superior Court of Vanderburgh County sustained Respondents' Motion for Summary Judgment and overruled Petitioners' Motion for Summary Judgment and issued its permanent injunction enjoining the enforcement of the Petitioners' use and service charge

Ordinance No. 83. (R. 391-395) On July 11, 1969, said lower Court entered its Nunc Pro Tunc Judgment wherein the Court declared said Ordinance to be unlawful and unconstitutional under Article I, Section 8, Clause 3 of the United States Constitution. (R. 403-408) On August 5, 1969, Petitioners timely filed their Transcript and Assignment of Errors wherein Petitoners, among other things, assumed as error and preserved for appeal the validity of said Ordinance under Article I, Section 8, Clause 3 of the United States Constitution. (R. 1-8)

The decision of the Superior Court of Vanderburgh County was subsequently affirmed by the Supreme Court of the State of Indiana on December 23, 1970. (Appendix A.)

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Indiana has passed upon a Federal question of substance which has not been settled by this Court and there is a conflict of authorities on this question among the various states. The specific question raised by this Petition for Writ of Certiorari concerns the constitutionality of an ordinance enacted by the Petitioner Airport Authority which sought to impose a use and service charge of One Dollar ($1.00) for each enplaning passenger of commercial aircraft at Petitioners' Airport for the privilege of using and enjoying the facilities which are being provided for said passengers and which use and service fee is designed, in part, to defray the costs of providing such facilities by the Petitioners. The question before the Court on this Petition for Writ of Certiorari relates to the ability of a state or municipal body to require interstate, as well as intrastate, commerce to pay its own way.

As stated, the Supreme Court of Indiana decided this case adversely to the Petitioners on December 23, 1970. Immediately prior to said decision, the Supreme Court of Montana, in the case of *Northwest Airlines, Inc. v. Joint City-County Airport Board*, 154 Mont. 352, 463 P.2d 470 (1970), declared unconstitutional a state legislative enactment establishing a service charge of One Dollar ($1.00) for each passenger enplaning air carriers at all publicly operated airports within the State. In the *Northwest* case, the Court declared that there was no issue before the Court as to the need for revenues to maintain and operate the Helena Airport nor as to the propriety of raising revenues by assessing proper charges on the commercial air carriers using the Airport since the record did not support such a need.

Subsequently, on January 29, 1971, the Supreme Court of New Hampshire, in the case of *Northeast Airlines, Inc., et al v. New Hampshire Aeronautics Commision, et al*, adopted a contrary view and held that a similar One Dollar ($1.00) enplaning fee did not constitute an unreasonable burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution and further held that it did not regard the decisions of the Montana Supreme Court and the Indiana Supreme Court in the instant case, as controlling, and, accordingly, did not adopt the views which these cases expressed. The New Hampshire Supreme Court declared that the critical issue in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all, citing *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 85 S. Ct. 1156, 14 L.Ed. 2d 68, 85 (1965).

Further, the Supreme Court of New Hampshire stated that even a reasonable charge to federal instru-

mentalities making "substantial" use of public airport facilities is sanctioned by Federal Statute, citing *49 USCA Section 1110(4)*. Accordingly, the Court concluded that the enplanement fee was what it purported to be, a fee for the use of facilities furnished by the public and that its incidence depends upon an event which is wholly intrastate, namely the enplanement of passengers within the State of New Hampshire at a facility publicly provided or supported; that the burden upon the carriers was minimal, and did not exceed reasonable compensation for the use provided. The opinion of the Supreme Court of the State of New Hampshire, *Merrimack, No. 6086*, is printed in Appendix C and is not yet reported in the official reports.

While the Respondents will, undoubtedly, oppose the granting of this Petition for Certiorari, it is virtually certain that the unsuccessful airlines in the New Hampshire proceeding, ultimately, will petition this Court for a review of its adverse decision.

Thus, the question of the validity of the Petitioner Airport Authority's Ordinance, here involved, under the Commerce Clause of the Federal Constitution is of far-reaching importance to all state and municipal taxing bodies where facilities are provided for interstate, as well as intrastate, commerce at a great financial burden to its taxpayers.

The Acts of 1959, Chapter 15, page 32, of the Indiana General Assembly, the same being *Burns' Indiana Statutes, Annotated, Section 14-1215*, specifically authorizes the Petitioner Airport Authority, at subparagraph 9:

> "to adopt a schedule of reasonable charges and to collect the same from all users of facilities and services within the jurisdiction of the District."

and at subparagraph 16 thereof to:

"... make all reasonable rules and regulations ... for the management and control of its airports and landing fields and other navigation facilities and other property under its control."

"... to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of any such airports or landing fields, and other air navigation facilities ... and to fix, charge and collect fees for public admissions and privileges."

The State of Indiana has long since held that the Legislature may confer and delegate the power to adopt rules, by-laws and ordinances and has the right to delegate to the Executive or Administrative its power to fix rates. *Financial Air Corporation v. Wallace*, 216 Ind. 114, 23 N.E.2d 472 (1939); *Sou. Ry. Co. v. Hunt*, 42 Ind. App. 1, 83 N.E. 721 (1908).

The record in this proceeding amply displays both the legislative authorization for the enactment of a user charge and the financial need of the Petitioner Airport Authority to raise the revenues created through the enactment of such charge for the purpose of defraying the cost of present and future requirements for capital improvements at the Petitioners' Airport.

The Respondents below stipulated and agreed as to the truth of certain facts submitted by the Petitioners below, each of which Stipulated Facts of the Petitioners are material and relevant to this Petition and support the constitutionality of the use and service charge established by Petitioners' Ordinance No. 33. (R. 469-490) These Stipulated Facts show, among other things, that:

(a) The use and service charge, Ordinance No. 33, was adopted by the Petitioners, Evansville-Vanderburgh Airport Authority District, in accordance with the legal procedures required by Indiana Law. (R. 489)

(b) In the year 1967, approximately 146,955 enplaning passengers boarded aircraft at Dress Memorial Airport. That the number of enplaning and deplaning passengers at Dress Memorial Airport are approximately the same (R. 478), and that Petitioners' Ordinance No. 33 imposes a use and service charge of One Dollar ($1.00) on all enplaning passengers of commercial airlines whether said enplaning passengers travel in intrastate or interstate commerce. (R. 480)

(c) That the vast majority of persons enplaning aircraft at Dress Memorial Airport are either initiating the first leg of a journey which will be completed by a return flight to Evansville or, conversely, are completing the second leg of a journey which had its origin at a locality other than Evansville. (R. 487)

(d) Approximately forty percent (40%) of the users of Dress Memorial Airport are non-residents of Vanderburgh County, Indiana, wherein Dress Memorial Airport is located, and that the use and service charge established by Ordinance No. 33 is designed to be collected from all commercial airline enplaning passengers using Dress Memorial Airport without regard to their residence or ownership of property within Vanderburgh County, Indiana. (R. 486)

(e) That the Terminal Building and most of its facilities are primarily designed for use by per-

sons travelling on commercial airlines and would not be essential for the operation of a non-commercial airport. (R. 480)

(f) That the real estate, runway lengths, approach areas, taxiways, ramp areas and approach lighting system of Dress Memorial Airport would not be so extensive except for the accommodation of commercial airline carriers and their passengers. (R. 480, 481)

(g) That the capital improvement program recommended by the consultants of the Petitioners is primarily designed for the safety, comfort and convenience of commercial airlines, its equipment, personnel and commercial airline passengers (R. 486) and based upon the present bonded indebtedness of the Petitioner Airport Authority and the need for additional capital improvements, as shown by the exhibits attached to the stipulations, there exists a need for additional revenue which the use and service charge, Ordinance No. 33, was designed to raise. (R. 486)

(h) That the adoption, initiation and fulfillment of the capital improvement program recommended by the consultants of the Petitioner Airport Authority and the retirement of the indebtedness created thereby will require more revenues than would be produced by the use and service charge, Ordinance No. 33, assuming that said improvements would be amortized over a fifteen (15) year period and that the forecast of probable passenger movement at the Petitioners' Airport is reasonably accurate. (R. 448)

(i) That, presently, the funds which are needed,

> over and above operating revenues, to retire existing and future capital improvement costs at Dress Memorial Airport are derived from tax levies on all assessed property located only within Vanderburgh County, Indiana, (R. 486) and that the fulfillment of the capital improvements program recommended by the consultants of the Petitioners will require more revenue than can be produced by the maximum tax levy now permitted by law to be levied by the Petitioners and will necessarily require additional revenues in excess of those which would be produced by Ordinance No. 33 in order to amortize the costs thereof. (R. 489)

The right of a state or municipality to charge for the use of valuable facilities furnished to commerce has been upheld by the Supreme Court of the United States. In the much cited case of *Huse v. Glover*, 119 U.S. 543, 7 S.Ct. 313, 30 L.Ed. 487 (1886), the Supreme Court of the United States was called upon to examine the constitutionality of an Illinois legislative enactment vesting a Board of Canal Commissioners with authority to prescribe rates or tolls for passage of all vessels through its locks. The Court, in sustaining the constitutionality of the enactment, held at page 548 of the opinion, that the exaction of tolls is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream and that private inconvenience must yield to the public good.

Additionally, the right of the states to impose upon motor vehicles using highways in interstate commerce such charges as will reasonably defray the expenses and represent a fair contribution to the cost of constructing and maintaining those highways has been well established. *Aero Mayflower Transit Co. v. R.R.*

Commissioners, 332 U.S. 495, 503, 68 S.Ct. 167, 92 L.Ed. 99 (1947).

The amount of charges and the method of collection are primarily for determination by the state itself, and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, such charges constitute no burden upon interstate commerce. *Hendrick v. Maryland*, 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385 (1914); *Richmond Baking Company v. Department of Treasury*, 215 Ind. 110, 18 NE.2d 778 (1938); *Kersey v. City of Terre Haute*, 161 Ind. 471, 473, 68 N.E. 1027 (1903).

As in the case of *Hendrick v. Maryland, supra*, where the Supreme Court of the United States declared that the highways are public property and it is within the power of the state to require the users thereof to contribute to their cost and maintenance, and to require those who make special use thereof to contribute to their upkeep, the runways, Terminal Building and related facilities of the Petitioner Airport Authority are literally the highways of commercial aircraft requiring contribution toward their upkeep and maintenance.

The question presented by this Petition for a Writ of Certiorari is one of grave and vital importance to the preservation of the right of states to provide for the adequate safety and accommodation of interstate as well as intrastate commerce. This is particularly true where the Federal government has not either assumed the exclusive cost and maintenance of such facilities or precluded the states, or its municipally delegated bodies from charging equitably for the use of such facilities.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

In The

SUPREME COURT OF INDIANA

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, KENNETH C. KENT, ELMO HOLDER, ROBERT M. LEICH, IAN F. LOCKHART, CLIFFORD K. ARDEN, JAMES A. GEYER and PAUL E. HATFIELD, On Behalf of Himself and All Other Persons Similarly Situated,	)	
v. *Appellants,*	)	No. 869 S 179
DELTA AIRLINES, INC., EASTERN AIRLINES, ALLEGHENY AIRLINES, INC., and WILLIAM F. WOOD, On Behalf of Himself and All Other Persons Similarly Situated,	)	
Appellees.	)	

APPEAL FROM THE SUPERIOR COURT OF VANDERBURGH COUNTY
Honorable Benjamin E. Buente, Judge

DeBRULER, J.

This is an appeal from a final judgment in the Vanderburgh County Superior Court granting appellees a permanent injunction against the enforcement of Evansville-Vanderburgh Airport Authority District's Ordinance No. 33, which ordinance establishes a charge of $1.00 for each passenger (with certain exceptions) enplaning a commercial aircraft at Dress Memorial Airport, Evansville, Indiana. The other appellants are either directors or officers of the appellant Airport Authority District.

On February 26, 1968, appellants enacted Ordinance No. 33, intended to become effective July 1, 1968, which levied a charge of $1.00 on enplaning commercial air passengers at Dress Memorial Airport. The ordinance, in pertinent part, reads:

> "**Section 1.** Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar ($1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.
>
> * * *
>
> "**Section 4.** The term 'each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport' shall not include, nor shall the use and service charge hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

"**Section 5.** All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof."

The appellee airlines are commercial air carriers transporting passengers, freight, express and mail to and from Dress Memorial Airport in interstate commerce under authorization of the Civil Aeronautics Board. Each of the appellee airlines leases and operates facilities at Dress Memorial Airport for the purposes of providing commercial air passenger and freight service. The appellees sought to enjoin the enforcement of Ordinance No. 33 on the grounds it was unconstitutional and illegal in several respects. In granting appellees a permanent injunction the trial court made eleven conclusions of law, but in the view we take of this case it is necessary to discuss only the following one:

"The $1.00 charge imposed by ordinance No. 33 upon passengers enplaning upon commercial aircraft at Dress Memorial Airport, not being related to or apportioned according to the use of facilities at Dress Memorial Airport, constitutes an unreasonable burden upon interstate commerce in the United States."

Appellants' arguments on appeal is that that conclusion is erroneous and the $1.00 tax is a valid service tax for the use of facilities provided by appellants at Dress Memorial Airport and thus not an unreasonable burden on interstate commerce.

There is no question that the incidence of the tax imposed by Ordinance No. 33 falls on interstate commerce. The tax is on the act of enplanement on one of the appellee airlines and in 1966, 88.4% of the persons departing Dress Memorial Airport upon the appellee airlines enplaned for ultimate destinations beyond the State of Indiana.

The basic principle governing the power of a state to levy a tax affecting interstate commerce is that such a tax "can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *National Bellas Hess, Inc. v. Dept. of Revenue* (1967), 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505; *Freeman v. Hewit* (1946), 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265. The mere fact that the taxing authority denominates a tax as a "use" or "service" does not settle the question, however. The classification used by the taxing authority for the assessment of such fees must embody a uniform, fair, practical standard bearing a reasonable relationship to the use of state facilities. *Northwest Airlines, Inc. v. Joint City-County Airport Bd.* (1970, Mont. S.Ct.), 463 P.2d 470; *Hendrick v. Maryland* (1915), 235 U.S. 610, 35 S.Ct. 140, 59 L.Ed. 385.

The sole issue then on this appeal is whether the act of enplaning a commercial aircraft is reasonably related to the use of the facilities at Dress Memorial Airport for which the $1.00 tax is levied.

The facts are undisputed and show the following:

In 1967, there were 146,955 enplaning passengers and 145,142 deplaning passengers on air carrier flights at Dress Memorial Airport. In 1967, there were 14,834 take-offs and landings by commercial air carriers and

there were 84,598 take-offs and landings by other civil and military aircraft.

The airport facilities at Dress Memorial Airport include the following facilities and services:

"(1) Main Terminal Building
air passenger service counters
air freight service counters and facilities
waiting room
rest rooms
dining room
bar
lunch counter
newsstand
barber shop
display areas
taxi stands
car rental counters
baggage facilities
telephone booths

"(2) Other Facilities
private hangar facilities
nonscheduled airline hangar facilities, office, space, and waiting areas
entrance and exit facilities and sidewalks
parking lots
fuel storage areas
office space
runways and taxi-ways
approach lighting system
instrument lighting system"

By the express terms of the Ordinance the revenue from the tax is for the support of all of these facilities, the relevant part stating:

"**Section 5.** All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the *construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.*" (Emphasis added.)

However, enplaning commercial air passengers are *not* the only persons using these facilities. It was stipulated by the parties that the above facilities and services are also used by the following classes of persons who are *not* subject to the $1.00 tax imposed by Ordinance No. 33:

(a) Enplaning commercial passengers who are active members of the armed forces;

(b) Enplaning commercial passengers stopping over or changing planes at Dress Memorial Airport after arrival by commercial aircraft;

(c) Deplaning commercial passengers;

(d) Persons arriving or departing on noncommercial or nonscheduled aircraft;

(e) Persons sending or receiving air freight shipments;

(f) Persons meeting or seeing off commercial and noncommercial passengers;

(g) Persons visiting the airport for the purpose of observing flight operations or for the purpose of using dining, bar, car rental, or other facilities.

These classes of uses of airport facilities actually constitute a majority of those persons who use one or more of the airport facilities.

It is obvious that certain enplaning commercial passengers are subject to the tax regardless of the extent to which they use the airport facilities. On the other hand persons who may make very extensive use of the facilities are not subject to the tax unless they actually board one of appellees' commercial flights. For example, a commercial passenger carrying only a briefcase may be driven to the airport by his wife, immediately buy a ticket and board the airplane. He is subject to the so-called "use" tax. Another person may drive to the airport and park his car at the facility provided, get a haircut, eat dinner, use the washroom, and then get in his own private jet and take off. He does not pay the $1.00 tax. Also a deplaning commercial passenger, who makes the same minimum use of the facilities as an enplaning commercial passenger, does not have to pay the tax.

The substantially identical issue was recently decided in *Northwest Airlines, Inc. v. Joint City-County Airport Bd., supra.* That case involved a Montana statute which authorized airport boards to impose on each commercial air carrier operating aircraft over 12,500 lbs. a so-called "service" charge of $1.00 for each originating passenger enplaning upon its aircraft at that airport.

The Montana Supreme Court held that the statute was unconstitutional in several respects including the fact that the tax could not be justified as a use and service fee because its imposition was not reasonably related to actual use of the airport facilities. The court said:

"In holding Chapter 281, and the tax imposed pursuant thereto, to be constitutional, the trial court rested its decision on the single proposition that the tax was user tax on passengers. A basic principle governing the power of the state to levy an exaction on interstate commerce, recently reaffirmed by the Supreme Court in National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756, 87 S.Ct. 1389, 1391, 18L.Ed.2d 505 (1967), is that 'State taxation falling on interstate commerce * * * can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' It follows from this that fees collected as compensation for the use of state facilities must be levied according to a 'uniform, fair, and practical standard.' Hendrick v. Maryland, 235 U.S. 610, 624, 35 S.Ct. 140, 59 L.Ed. 385 (1915). The formula or classification adopted by the state must bear a reasonable relation to the use of state facilities, McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 60 S.Ct. 504, 84 L.Ed. 683 (1940), in order to insure that interstate commerce bear only the burden of fair compensation or intrastate activities incidental to it.

"Measuring against these constitutional standards, Chapter 281 cannot be justified as a use tax. The charge is levied arbitrarily without any reference to actual use of airport facilities by the passenger's use of terminal facilities. The stipulated facts indicate that the majority of users of the airport (arriving passengers, private aviators, visitors, etc.) are exempted from the payment of any charge, yet a substantial number of persons so exempted make equal or greater use

of airport facilities. Similarly, a passenger who has originated his journey elsewhere by commercial air carrier, and who makes a stopover at the Helena airport using airport facilities, is exempt from payment of the fee, while a traveler following an identical route and making no greater use of the facilities must pay if he arrives in Helena by means other than by commercial air carrier." 463 P.2d at 474.

The fact that the Montana tax was in form imposed on the carrier instead of the passengers as in the case at bar, is of no legal significance. *Henderson v. Mayor of New York* (1876), 92 U.S. 259, 23 L.Ed. 543.

It is clear and we so hold that the tax imposed by Ordinance No. 33 is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of Art. 1, § 8, cl. 3 of the United States Constitution.

Judgment affirmed.

Hunter, C.J., Arterburn, Givan and Jackson, JJ., concur.

APPENDIX B

I. UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, SECTION 8, CLAUSE 3:

Section 8. POWERS OF CONGRESS.

(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

II. INDIANA STATUTES INVOLVED

Airport Authority District Statute (Evansville), Acts of 1959 of the Indiana General Assembly, Chapter 15, page 32, the same being Burns Indiana Statutes, Annotated, Section 14-1215, which provides as follows:

14-1215. POWERS OF THE BOARD. — In addition to the powers and duties conferred upon it elsewhere in this act (Sections 14-1201 — 14-1235), such board shall have full power and authority to do all acts necessary or reasonably incident to carrying out the purpose of this act including, but not in limitation thereof, the following:

1. As a municipal corporation, in its name to sue and be sued in any court of competent jurisdiction.

. . .

9. To adopt a schedule of reasonable charges and to collect the same from all users of facilities and services within the jurisdiction of the district.

. . .

16. General Powers.

. . . To manage and operate any and all airports and landing fields and other air navigation fa-

cilities now or hereafter acquired or maintained by any such district; and to lease all or any part of any such airport or landing field and any buildings and other structures thereon and parts hereof and to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of any such airports or landing fields, and other air navigation facilities, and for aircraft landing thereon, and the servicing thereof; and to erect and construct such public recreational facilities as will not conflict or interfere with air operational facilities; and to fix, charge and collect fees for public admissions and privileges; . . .

III. ORDINANCE NO. 33 PASSED BY THE EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT ON FEBRUARY 26, 1968

EVANSVILLE-VANDERBURGH AIRPORT
AUTHORITY DISTRICT
ORDINANCE NO. 33

AN ORDINANCE ESTABLISHING AND FIXING A USE AND SERVICE CHARGE FOR ALL ENPLANING PASSENGERS UTILIZING AIRPORT PREMISES AND FACILITIES.

WHEREAS, the Acts of the Indiana General Assembly, 1959, Chapter 15, Section 30, provides that the acquiring, establishment, construction, improvements, equipment and maintenance and the control and operation of Airports and landing fields for aircraft under and pursuant to the Act creating the Evansville-Vanderburgh Airport Authority District, shall and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the

use and general welfare of all of the people of the State of Indiana, as well as all of the people residing in the District of said Board, the same being coterminous with the boundaries of Vanderburgh County, Indiana; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District was duly created under and pursuant to the terms and provisions of the Acts of the Indiana General Assembly, 1959, Chapter 15, and upon its creation and establishment, said Airport Authority District assumed the responsibility for the care, construction, improvement, equipment, maintenance and control of the Dress Memorial Airport located in Evansville, Vanderburgh County, Indiana; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District is empowered, pursuant to said Acts of the Indiana General Assembly, to enact ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from all users of facilities and services provided by said Dress Memorial Airport; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District, pursuant to said Acts of the Indiana General Assembly, has the further power to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Dress Memorial Airport and to fix, charge and collect fees for public admissions and privileges; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District has determined, upon investigation, that the use of said Airport and its various facilities is enjoyed by persons and taxpayers not only residing in Vanderburgh County, Indiana, but by num-

erous persons residing outside the jurisdiction of said District who do not directly contribute toward the support, construction, improvement, equipment, maintenance and control of said Airport and its facilities; and

WHEREAS, the Board of said Airport Authority District has determined that there exists a need for additional revenue with which to defray the continued and future costs of construction, improvement, equipment and maintenance of said Airport so as to provide for the reasonable safety, convenience and comfort of enplaning passengers using the facilities of Dress Memorial Airport; and

WHEREAS, the Board of said Evansville-Vanderburgh Airport Authority District, after due and deliberate consideration, has determined that the responsibility for the support, construction, improvement, equipment and maintenance of said Airport and its facilities, lies and should be shared more equally by all those persons who enjoy and use its facilities and services;

NOW, THEREFORE, BE IT RESOLVED by the Board of Evansville-Vanderburgh Airport Authority District as follows:

Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar ($1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

Section 2. Each commercial airline now or hereafter operating commercial aircraft to and from the Dress Memorial Airport is hereby charged, together with its various agents and travel agencies, servants,

employees and representatives, with the responsibility of collecting said use and service charge.

Section 3. Said commercial airlines are hereby further directed to remit to Evansville-Vanderburgh Airport Authority District all the use and service charges so collected:

(a) for the period commencing July 1 and terminating December 31 of each year, on or before January 31 next following said six month period;

(b) for the period commencing January 31 and terminating June 30 of each year, on or before July 31 next following said six month period.

Said remittance shall be based upon the number of enplaning passengers at Dress Memorial Airport as hereinabove described in Section 2 of this Ordinance, times the use and service charge of One Dollar ($1.00), less six percent (6%) of all amounts so collected, which percentage is hereby allocated and allowed to said airlines for the purpose of defraying the administrative costs of collecting and remitting said use and service charge.

Section 4. The term "each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" shall not include nor shall the use and service charge hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Van-

derburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Section 6. If any provision or clause of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 7. This Ordinance shall be in full force and effect upon its passage and approval by the Board of Evansville-Vanderburgh Airport Authority District as provided by law, and shall remain in full force and effect until amended, modified or revoked by the Board of said District.

PASSED by the Board of Evansville-Vanderburgh Airport Authority District on this 26th day of February, 1968, and on said day signed by the President and attested by the Secretary of Evansville-Vanderburgh Airport Authority District.

/s/ Kenneth C. Kent
Kenneth C. Kent, President

ATTEST:

/s/ Robert M. Leich
Robert M. Leich, Secretary

APPENDIX C

OPINION OF NEW HAMPSHIRE SUPREME COURT

Merrimack,
No. 6086.

NORTHEAST AIRLINES, INC. *& a.*
v.
NEW HAMPSHIRE AERONAUTICS COMMISSION *& a.*
January 29, 1971

Devine, Millimet, McDonough, Stahl & Branch and *Robert A. Backus (Mr. Joseph A. Millimet* orally) for the plaintiffs.

Warren B. Rudman, Attorney General and *W. Michael Dunn,* Assistant Attorney General (*Mr. Dunn* orally), for the defendants.

DUNCAN, J. By petition for declaratory judgment, the plaintiff airlines question the constitutionality of RSA 422:43 (supp.), imposing upon them, as common carriers of passengers for hire by aircraft on regular schedules, a service fee of one dollar for each passenger emplaning upon their aircraft at publicly operated landing areas in this State. For the three-year period presently involved, the fees charged to the plaintiff Northeast Airlines, Inc. have averaged somewhat over $41,000 a year, and to the plaintiff Mohawk Airlines a little over $2600. The facts were stipulated by the parties, and the Superior Court (*Loughlin,* J.) reserved and transferred without ruling all questions of law presented.

When first before this court as a proposal in the form of House Bill 435 at the 1959 session of the legis-

lature, the service fee was considered by reason of statutory definition (RSA 422:3(II)) to be applicable only to carriers engaged solely in intrastate commerce, and was considered not to violate the Constitution of this State, so long as it was reasonable recompense for facilities furnished. *Opinion of the Justices*, 102 N.H. 73, 150 A. 2d 522 (1959). It was intimated that objection because of its effect upon interstate commerce was not likely in view of *Aero Transit Co. v. Comm'rs*, 332 U.S. 495, 92 L.Ed. 99, 68 S.Ct. 167 (1947) and *Tirrell v. Johnston*, 86 N.H. 530, 171 A. 641 (1934). *Id.* at 75, 150 A. 2d at 524.

As enacted in 1959, the statute was made applicable to common carriers of passengers "whether in interstate or intrastate operations" (RSA 422:43); and the phrase "passenger carrier by aircraft" was substituted for the phrase "air carrier" used by the bill. Thus House Bill 435 as enacted was made applicable to interstate as well as intrastate commerce.

Th plaintiffs suggest that because of these and later changes, it cannot be said that section 43 (supp.) has "ever been reviewed by this court." While this may be so, the fact remains that the essential characteristics of the charge or fee were considered in *Opinion of the Justices*, *supra*, and it was upheld. *See also Opinion of the Justices*, 94 N.H. 513, 52 A. 2d 859 (1947). We continue to regard the charge as being what it purports to be: a "service fee on (common) carriers" of passengers for hire on a regular schedule; while s. 44 of the act imposes a like charge upon carriers under contract or by charter. RSA 422:44.

We also regard the charge as one levied upon the carrier and not the passenger, although we recognize that the statute expressly provides that it shall not

prevent the carrier from collecting the fee over from its passengers. In this connection we note also that by reason of a 1969 amendment the amount of the fee now depends not only upon the number of passengers carried, but also upon the gross weight of the aircraft. RSA 422:43 (supp.). Thus for planes having a gross weight of less than 12,500 pounds, which are crafts described by federal statute as "small aircraft" (26 U.S.C.A. s 4263 (d) (1967), the fee is one-half of that assessed per passenger against the plaintiffs, which operate heavier aircraft. Since we accept the view that the charge is levied upon the carrier, we do not reach the argument advanced by the plaintiffs that the statute invades the constitutional rights of passengers to travel interstate. *See Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969).

Our conclusion that the fee is levied upon the carrier is fortified not only by the express language of the statute, but also by the provision originating with House Bill 435 *supra*, that the proceeds of the tax shall be covered into the aeronautical fund established by section 42, for the purpose of establishing and maintaining air navigation facilities, and liquidating obligations incurred under the aeronautics act. RSA 422:42.

The cases from other jurisdictions upon which the plaintiffs rely in support of their arguments do not persuade us that our statute must be held invalid. In *Allegheny Airlines, Inc. v. Sills*, 110 N.J. Super. 54, 264 A. 2d 268 (1970), a statute under attack would have imposed a service charge for the benefit of municipalities which did not contribute to the management or cost of operation of the airport in question. Hence the court concluded that the charge could not be jus-

tified as a service charge, and was invalid as a tax upon interstate commerce. In holding the charge invalid, the court relied upon *Northwest Airlines, Inc. v. Joint City-County Air. Bd.*, 154 Mont. 352, 463 P.2d 470 (Mont. 1970). That case involved a statute more closely resembling our own. It was considered by the Montana court to be in essence a tax upon the passengers, and in holding it invalid the court placed substantial reliance upon *Passenger Cases*, 48 U.S. (7 How.) 283, 12 L. Ed. 702 (1849), and upon *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 18 L. Ed. 745 (1867), which invalidated a tax expressly imposed upon passengers. Those decisions in turn relied upon *McCulloch v. Maryland*, 17 U.S. (4 Wheat. 316, 4 L.Ed. 579 (1819) and its unsound declaration . . . that the power to tax is a power to destroy" *(Tirrell v. Johnston*, 86 N.H. 530, 547, 171 A. 641, 651 (1934) a declaration to which Mr. Justice Holmes later rejoined, in *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223, 72 L.Ed. 857, 859, 48 S.Ct. 451, 453 (1928): "not . . . while this Court sits."

Even in cases involving taxes upon interstate commerce, which this case is not, the law has so far advanced since *McCulloch v. Maryland supra*, that a recent comment could say that "Both judicial and legislative developments stemming from the Supreme Court's decision in *Northwestern* [*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 3 L. Ed. 2d 421, 79 S. Ct. 357 (1959)] suggest that the critical issue in state taxation of interstate commerce is how interstate commerce may be taxed rather than whether it may be taxed at all" (citing *General Motors Corp. v. District*, 380 U.S. 553, 14 L. Ed. 2d 68, 85 S. Ct. 1156 (1965) and *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 19 L. Ed.

2d 1201, 88 S. Ct. 995 (1968)). Note, 36 U. of Chi. L. Rev. 186, 204-05.

Most recently the *Northwest Airlines* case *supra* was followed and heavily relied upon in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 265 N.E. 2d 27 (Ind. 1970), invalidating a district ordinance which imposed a use and service charge for the purpose of defraying the costs of the district's airport, upon the ground that the "tax imposed" was not "reasonably related to the use of facilities" and was therefore a burden upon interstate commerce. Since we do not regard the authorities relied upon by this and the *Northwest Airlines* case as controlling, we do not adopt the views which they express.

Many of the plaintiffs' objections to the carrier service fee are answered by the comprehensive opinion of *Peaslee*, C. J. in *Tirrell v. Johnston supra*, upholding the validity of the gasoline road toll under state and Federal Constitutions. As was there observed, "The state may tax things used in interstate commerce as it taxes other like things. This is not taxing interstate commerce." Id. at 551, 171 A at 653. However, we do not consider the charge to be an act of the State "in its sovereign capacity as a layer of taxes for the support of government or a regulator of conduct." *Tirrell v. Johnston, supra* at 540, 171 A. at 647. We regard it rather as a "charge for the use of facilities furnished." *Id.* at 541, 171 A. at 647.

The complaint that the charge is discriminatory because imposed upon an arbitrary class of users including the plaintiffs is not convincing. Other classes of users, whose use of the facilities is only irregular, or for purposes incidental to business other than the business of carriage of passengers by air for hire may

reasonably be differently classified, as may the carriers of passengers by lighter craft, having smaller carrying capacities. *See Morf v. Bingaman*, 298 U.S. 407, 80 L. Ed. 1245, 56 S.Ct. 756 (1936). Even a reasonable charge to federal instrumentalities making "substantial" use of public airport facilities is sanctioned by federal statute. 49 U.S.C.A. s 1110 (4)

We conclude that the charge in question is what it purports to be, a fee for the use of facilities furnished by the public. Its incidence depends upon an event which is wholly intrastate, namely the emplanement of passengers within this jurisdiction at a facility publicly provided and supported; the burden upon the carrier is minimal, and is not claimed to exceed reasonable compensation for the use provided. *Aero-Transit Co. v. Comm'rs*, 332 U.S. 495 *supra; Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 94 L. Ed. 1053, 70 S. Ct. 806 (1950); *Bode v. Barrett*, 344 U.S. 583, 97 L. Ed. 567, 73 S. Ct. 468 (1953); Annot., 97 L. Ed. 573 (1953); Annot., 17 A.L.R. 2d 421 (1951).

The fees imposed are valid and collectible, and a declaratory judgment in favor of the defendant Director should be entered accordingly.

Judgment for the defendants.

All concurred.